SEGAMAT PARKING SERVICES SDN BHD

v.

MAJLIS DAERAH SEGAMAT UTARA & ANOTHER CASE

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[ORIGINATING MOTIONS NOS: 25-45-2007 & 24(L)-990-2007]
15 DECEMBER 2008

ARBITRATION: *Award - Challenge to award of arbitrator - Challenge made after final award handed down - Whether constituting "other related proceedings" - Applicable law - Whether Arbitration Act 1952 - Whether Arbitration Act 2005 - Application pursuant to 1952 Act - Whether fatally flawed - Arbitration Act 1952, ss. 23, 24 - Arbitration Act 2005, ss. 34, 42, 50, 51 - Rules of High Court 1980, O. 69 r. 4*

WORDS AND PHRASES: *"Arbitral proceedings" - Section 51(2) Arbitration Act 2005 - Whether only confined to proceedings before the arbitrator or arbitral tribunal*

The parties herein had resorted to resolve their dispute by way of arbitration, and arbitral proceedings hence commenced as between them on 29 March 1995 under the purview of the Arbitration Act 1952 ('1952 Act'). On 29 October 2007, the arbitrator handed down his award and the same was published on 9 November 2007. In the meanwhile, on 15 March 2005, the new Arbitration Act 2005 came into force ('2005 Act') effectively repealing the 1952 Act. Following the arbitrator's award aforesaid, the respondent (Majlis Daerah Segamat Utara) decided to refer certain questions of law to the instant court, and consequently mooted an originating summons therefor pursuant to ss. 42 and 50 of the 2005 Act. The applicant too sought to challenge the award, but instead of employing the 2005 Act, filed an originating motion under ss. 23 and 24 of the 1952 Act read together with O. 69 r. 4 Rules of the High Court 1980. Considering the employment of the differing legislation thus, before the learned Judicial Commissioner, a question arose as to whether the parties' challenge to the said award ought to have been made under the 2005 Act or under the 1952 Act.

Held (ruling applicant's mode of application as fatally flawed):

(1) For the purpose of determining the issue at hand, the most crucial provision is s. 51 of the 2005 Act (Repeal and Saving), particularly the phrase "arbitral proceedings" in subsection (2) thereof. This term has not been anywhere defined. That notwithstanding, reading s. 34(1) and (2) of the 2005 Act, it is clear that an arbitral proceeding is confined to proceedings before the arbitrator or arbitral tribunal only. Hence, any other proceedings taking place after a final award is handed down or after the termination of the proceeding under any one of the circumstances envisaged under s. 34(2) of the 2005 Act is no longer part of arbitral proceedings. (paras 8-10)

(2) The saving clause in s. 51 of the 2005 Act operates only in respect of arbitral proceedings couched in the aforesaid terms. It follows that other related proceedings upon termination of arbitral proceedings constitute 'proceedings relating to arbitration'. That being so, such proceedings (including the one before the court) shall be governed by the new 2005 Act, *ie*, in accordance with Part III of the Act under the heading "additional Provisions Relating to Arbitration". (para 11)

(3) The words in s. 51(2) of the 2005 Act are clear and unambiguous and therefore warrant a literal interpretation. Equally, there is nothing in the 2005 Act to suggest that it carries a retrospective effect. (para 12)

(4) The applicability of the law governing arbitral proceedings in this case as provided by ss. 13-18 of the 1952 Act is not in issue as the arbitral proceedings had all along been conducted in accordance with the provisions of the 1952 Act. What is in issue is the law governing proceedings relating to arbitration upon termination of arbitral proceedings as both the applications before the court are proceedings brought after a final award had been handed down and brought after the coming into force of the 2005 Act. By the plain words of s. 51(2) of the 2005 Act, the relevant law relating to arbitration post arbitral proceedings shall be the new 2005 Act. Hence, the challenge mounted by the parties against the said award has to be made under the 2005 Act. (para 13)

(5) The applicant's application having been made under ss. 23 and 24 of the 1952 Act is wrong in law. The applicant thus does not have a proper application before this court to be considered. The non-compliance of the requirement under the 2005 Act is fatal and the applicant's application hence must stand dismissed. (para 16)

Case(s) referred to:

Kumpulan Kamuning Sdn Bhd v. Rajoo Thangaveloo & Ors [1983] 2 CLJ 242; [1983] CLJ (Rep) 207 FC ***(refd)***

Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441 SC ***(refd)***

Putrajaya Holdings Sdn Bhd v. Digital Green Sdn Bhd [2008] 1 LNS 92 ***(refd)***

Legislation referred to:

Arbitration Act 1952, ss. 13, 14, 15, 16, 17, 18, 23, 24

Arbitration Act 2005, ss. 34(1), (2), 42, 50, 51(2), (3)

Interpretation Acts 1948 and 1967, ss. 30(1)(d), 34(1), (2), 51(2), (3)

Rules of the High Court 1980, O. 69 r. 4

For the applicant/defendant - A Sethu; M/s Syarikat A Sethu

For the respondent/plaintiff - Yau Jiok Hua; M/s Yau Jiok Hua & Co

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Ahmadi Asnawi JC:

[1] Both the usul pemula and saman pemula indicated above were agreed to be heard together. The two proceedings emanate from an award in an arbitration between the parties handed down by Dr Wong Kim Fatt. The arbitration commenced on 29 March 1995 and the arbitrator's award dated 29 October 2007 was published on 9 November 2007.

[2] Being dissatisfied with the said award, the Majlis Daerah Segamat Utara has referred certain questions of law to this court under s. 42 of the Arbitration Act 2005 (Act 646) (hereinafter referred to as "the 2005 Act"). They commenced to do so by way of originating summons by virtue of s. 50 of the same which provides the mode for making such application to court. Hence the Saman Pemula No. 24 (L)-990-2007.

[3] Segamat Parking Services Sdn Bhd being equally dissatisfied with the said award, also applied under ss. 23 and 24 of the Arbitration Act 1952 (hereinafter referred to as "the 1952 Act") to challenge the said award. The 1952 Act does not prescribe the mode to mount such challenge. Hence they go by way of O. 69 r. 4 of the Rules of the High Court 1980 ("RHC 1980) to pursue the same. Usul Pemula No. 25-45-2007 is their said application.

[4] The entire arbitral proceedings from its commencement on 29 March 1995 to its conclusion on 9 November 2007 was conducted under the purview of the 1952 Act.

[5] The court was thus requested to rule on a preliminary issue of whether the challenge by the parties to the said award ought to have been made under the 2005 Act which came into force on 15 March 2005 or under the 1952 Act.

[6] For the purposes of this judgment, Segamat Parking Services Sdn Bhd is to be referred to as the applicant and Majlis Daerah Segamat Utara is to be referred to as the respondent.

[7] It was the contention of learned counsel for the applicant that the general rule in the construction of a statute is that in the absence of a contrary intention, an enactment is presumed not to have retrospective effect. The 2005 Act is a new enactment altogether, replacing the old 1952 Act. By virtue of s. 30(1)(d) of the Interpretation Acts 1948 and 1967, the repeal of a written law in whole or in part shall not affect any such right, privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy maybe instituted, continued or enforced as if the repealing law had not been made. The remedies referred to in the present case are the remedies to challenge the award provided under the 1952 Act and not under the 2005 Act. This is a vested right which cannot be taken away by the 2005 Act. Additionally the savings clause offered by s. 51(2) of the 2005 Act expressly preserved the rights and remedies available to the applicant under the 1952 Act as if the 2005 Act had not been enacted.

[8] For the purpose of determining the issue at hand, in my view the most crucial provision in the 2005 Act is s. 51. The said section provides:

51. Repeal and savings

(1) The Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 are repealed.

(2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.

(3) Nothing in this Act shall affect any proceedings relating to arbitration which have been commenced in any court before the coming into operation of this Act.

[9] The key words in s. 51(2) is "the arbitral proceedings". However this term is not defined anywhere in the 2005 Act. But s. 34(1) of the 2005 Act provides that "the arbitral proceedings shall be terminated by a final award or by an order of the arbitral tribunal in accordance with subsection (2)". Subsection (2) provides as follows:

(2) The arbitral tribunal shall order the termination of the arbitral proceedings where:

(a) The claimant withdraws the claim, unless the respondent object to the withdrawal and the arbitral tribunal recognises the respondent's legitimate interest in obtaining a final settlement of the dispute;

(b) The parties agree on the termination of the proceedings:

(c) The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

[10] It is thus very clear from the section that an arbitral proceedings is confined to proceedings exclusively before the arbitrator or arbitral tribunal only. Any other related proceedings not before the arbitrator or arbitral tribunal are not arbitral proceedings. It goes without saying that any other proceedings taking place after a final award is handed down or after the termination of the proceeding under any one of the circumstances envisaged under s. 34(2) of the 2005 Act is no longer part of the arbitral proceedings.

[11] That being said, the saving clause offered by s. 51 of the 2005 Act operates only in respect of arbitral proceedings couched in terms as above. Other related proceedings upon termination of arbitral proceedings are proceedings relating to arbitration. Such proceedings, including the one presently before me, shall be governed by the new Act (2005 Act), provided in Part 111, under the headings "Additional Provisions Relating to Arbitration".

[12] The words in s. 51(2) of the 2005 Act are clear and unambiguous, carrying a plain meaning. In such event it warrants the adoption of a literal approach to the interpretation of the section. (See *Kumpulan Kamuning Sdn Bhd v. Rajoo Thangaveloo & Ors* [1983] 2 CLJ 242; [1983] CLJ (Rep) 207 and *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441). Equally there is nothing in the 2005 Act to suggest that it carries a retrospective effect. All that it caters for is to provide a platform for the continuation of the proceedings upon the repeal of the original statute upon which the proceedings was first instituted and where such arbitral proceedings was terminated at a point in time after the coming into force of the 2005 Act.

[13] The applicability of the law governing arbitral proceedings in this case as provided by ss. 13-18 of the 1952 Act is not in issue as the arbitral proceedings here had all along been conducted in accordance with the provisions of the 1952 Act from the start to the handing down of the award on 9 November 2007 on account that the arbitral proceedings had commenced before the coming into force of the 2005 Act. What is in issue is the law governing proceedings relating to arbitration upon termination of the arbitral proceedings as both the applications before me are proceedings brought after a final award had been handed down and brought after the coming into force of the 2005 Act. By virtue of the plain words of s. 51(2) of the 2005 Act, on the grounds already given in the preceding paragraphs, the relevant law relating to arbitration post arbitral proceedings shall be governed by the new 2005 Act. It is thus my ruling that the challenge mounted by the parties against the said award shall be made under the 2005 Act.

[14] Additionally the terms of the arbitration agreement between the parties herein was not ventilated before the court by either party unlike the case in *Putrajaya Holdings Sdn Bhd v. Digital Green Sdn Bhd* [2008] 1 LNS 92, thereby depriving the court the opportunity of assessing the real intention of the parties.

Consequently it follows through that the applicant's usul pemula is not grounded upon the terms of the said arbitration agreement that the arbitration process is to be conducted in accordance with the 1952 Act all the way up till its final conclusion. Nevertheless the arbitration agreement is never a central issue here.

[15] Equally s. 51(3) of the 2005 Act is of no help to the applicant either on account that before the repeal of the 1952 Act (and before the coming into force of the 2005 Act) this application/usul pemula has yet to find its way into the High Court Registry.

[16] Henceforth the applicant's application having been made under ss. 23 and 24 of the 1952 Act is wrong in law. Therefore the applicant does not have a proper application before this court to be considered. The non compliance of the requirements under the 2005 Act is fatal to the applicant's case and the nett effect is the dismissal of the applicant's application with cost.